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IN THE

Supreme Court of the United States

OCTOBER TERM 1930.

No. 261.

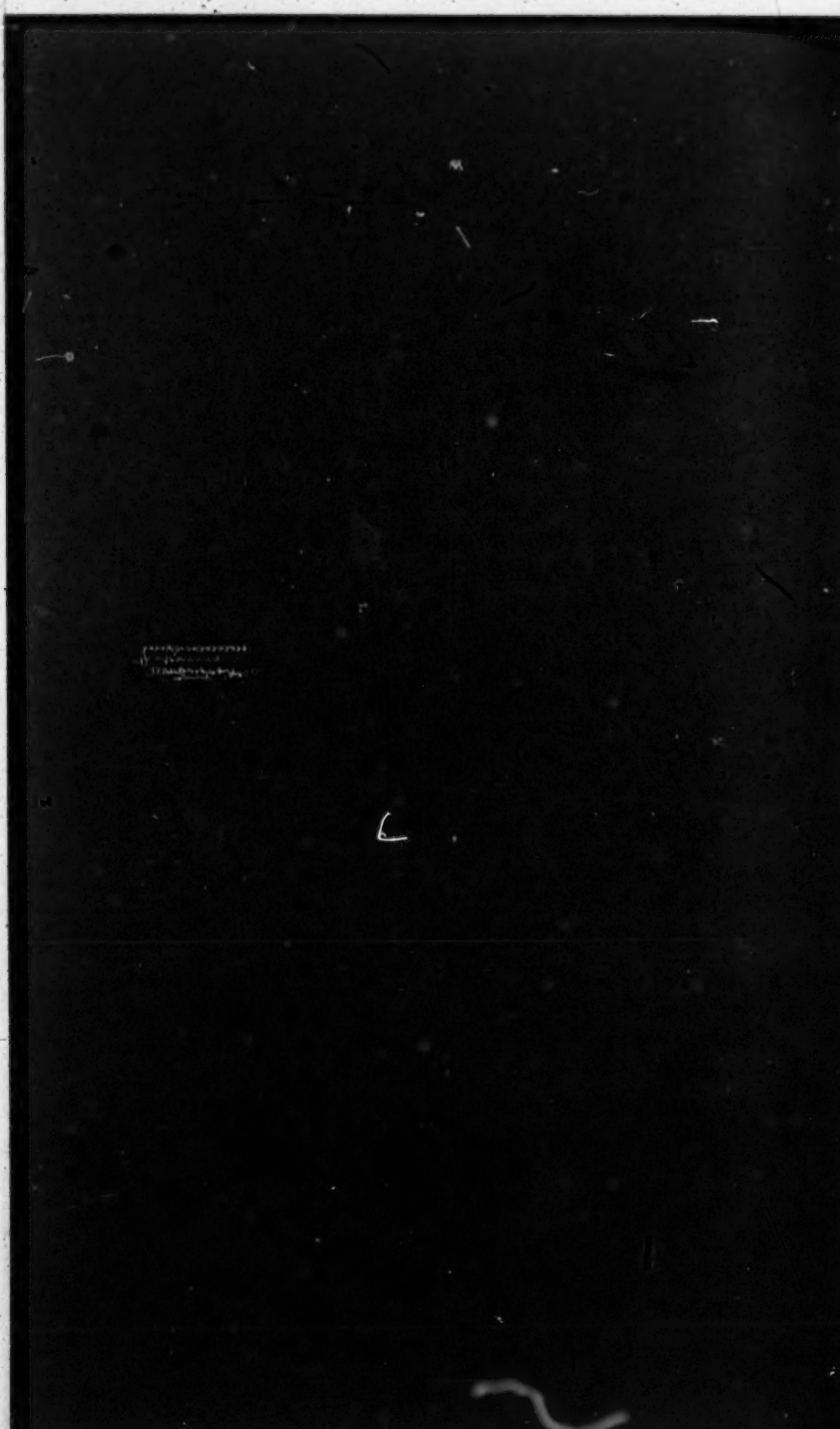
STANDARD MARINE INSURANCE COMPANY, LTD.,
Petitioner,

—against—

SCOTTISH METROPOLITAN ASSURANCE COMPANY, LTD.,
Respondent.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

T. CATESBY JONES,
JAMES W. RYAN,
Counsel for Respondent.



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THE OPINIONS OF THE COURTS BELOW.

The opinion of the District Court is reported in 28 Fed. (2nd) 540, and that of the Circuit Court of Appeals affirming it in 39 Fed. (2nd) 436.

Statement of the Case.

The statement of the case appearing in the petition and supporting brief does not give to the Court a clear conception of the decree of the trial Court (R., 92) which was affirmed by the Circuit Court of Appeals (R., 111), and which it is now sought to review (R., 92). The trial Court in its opinion (R., 89) clearly understood the situation and dealt with it in accordance with the well-settled principles of subrogation. The Circuit Court of Appeals in its opinion (R., 108) also clearly understood the situation and affirmed the decree below. Both decrees turned on questions of fact which are determined by the agreed facts (R., 45) and not by the fourteen "findings of fact" mistakenly made by the Commissioner

(R., 65). It is from these fourteen "findings" (R., 65 to 70) that counsel for petitioner has extracted the remarkable statements and figures which appear on page 6 of the petition and which form the foundation for all his subsequent argument and for his contention that the case is similar to the *Brown* case in the Ninth Circuit and therefore that there is a conflict in decisions.

Counsel for petitioner admits that he is asking this Court to reinstate a "holding of the Special Commissioner which both lower Courts have reversed" (Petition, p. 2). That Commissioner's holding is at page 65 of the record and shows on its face that it was based on fourteen "Findings of Fact" (R., 65-70) which neither Court below has found or accepted and which were made by the Commissioner through confusion and error because no evidence at all was introduced before him or the Court to establish them.

At page 2 of the petition counsel for petitioner says:

> "The special commissioner held that the two insurance companies, under their subrogated rights, were entitled to share *pro rata* in the $309,500 cargo's recovery against the 'Leonard B. Miller' (Paragraph 5, p. 71). It was this holding of the special commissioner which both lower Courts have reversed."

The confused understanding which the Special Commissioner had of the situation and of the facts is so evident that counsel for petitioner who is now trying to reinstate the Commissioner's holding, has found it necessary to attempt an original reformulation of "facts". The extent to which petitioner in doing this has had to resort to the Commissioner's "findings" would be still more evident if he had followed the usual practice of making citations of the record to support the various statements of fact. Inasmuch as the settled rule of this Court is

that it will not disturb the concurrent findings of fact of both lower Courts, and inasmuch as the questions argued by petitioner do not arise excepting to the extent and on the limited facts found and accepted by the two lower Courts, it would seem unnecessary to make further reply to the petition for certiorari. No authority is cited by counsel to support his contention that this Court will in effect hold another commissioner's hearing on questions of fact in the face of concurrent findings of fact and conclusions of law by both Courts below.

An illustration of the type of inaccuracy of fact which repeatedly occurs in petitioner's statement of the case is on page 6 of the petition, where the first two lines refer to a "highest market value" of $1.69¾ on October 27th, citing in support of that statement page 69 of the record, which an examination of the record shows is the tenth of the baseless fourteen "findings of fact" made by the Commissioner. Still more unwarranted is petitioner's failure to call the Court's attention to the fact that that value was not at the port of shipment (which value is the only one recovered in the collision suit, and represented by the fund being distributed), but at Montreal, as is conclusively shown on page 63 of the record in the agreed statement of facts signed by counsel for petitioner himself. It is there agreed that "our (the petitioner's) assured's open policy will be figured on the basis of the highest C. I. F. Montreal quotation during the ten days from October 27th" (R., 63). The exact opposite of what counsel for petitioner states as "facts" at the bottom of page 5 and at the top of page 6 is thus shown by petitioner's own document and agreed statement of facts. The Courts below concurred in limiting their decisions to the agreed statement of facts (R., 45) and declined to go outside

the record and discuss the other additional "facts" which the Commissioner had mistakenly assumed and "found".

The inaccuracies in the petitioner's statement of the case are so numerous and so scattered that a detailed correction of them would unduly extend this brief.

In order, therefore, that the true situation may be before the Court, we shall state rather fully and in orderly fashion the facts upon which the two Courts below based their opinions (R., 89, 108) and particularly upon which the trial Court based its decree, distributing the fund (R., 92). These facts are all contained in the agreed statement of facts which will be found at pages 45 *et seq.* of the record, and the exhibits annexed thereto. We take it it will be unnecessary to discuss the obvious proposition that the Courts below were justified in ignoring the findings of fact which the Commissioner confusedly made and which form the basis for the petition for certiorari. When parties formally agree as to all the facts it is unnecessary and improper for a commissioner to make findings.

Facts.

On October 26, 1924, at Fort William and Port Arthur, the Canadian Cooperative Wheat Producers, Limited, shipped 200,000 bushels of wheat on the steamship "Glenorchy", for carriage to Port Colborne for transshipment to Montreal (R., 46). On October 26, 1924, the Canadian Cooperative Wheat Producers, Limited, issued a certificate of insurance on the shipment for $284,000, on a valuation of $284,000, based on a value of $1.42 per bushel (R., 47, Exhibits "D" and "E"; R., 59-61). The certificate was issued under an open policy No. L-100023 of respondent in the usual cargo

form covering all shipments by the Canadian Cooperative Wheat Producers, Limited, during a specific period.

The policy of insurance provided:

"Valued, premium included, at amount of invoice including all charges in the invoice and including prepaid or advanced or guaranteed freight, if any, plus Ten Percent unless otherwise agreed upon prior to shipment" (R., 57).

"To cover 100% interest in all shipments of grain and/or flaxseed and/or cereals and/or maize, their own, or in which they may have an insurable interest, or the property of others, which they may receive instructions to insure, such instructions being mailed or given the Canadian Cooperative Wheat Producers, Limited, in writing, prior to shipment and before any known or reported loss or accident" (R., 55).

"It is also understood and agreed that in case of loss or damage under this policy the assured in accepting payment therefor thereby by that act assigns and transfers to these assurers all his right or their right to claim for loss or damage, as against the carrier or any person or persons, corporation or corporations, to inure to their benefit, however, to the extent only of the amount of the loss or damage and attendant expenses of recovery paid or incurred by the said assurers and any act of the insured, waiving or transferring or tending to defeat or decrease any such claim against such carrier or any person or persons, corporation or corporations whether before or after the insurance was made under this policy shall be a cancellation of the liability of these assurers, for or on account of the risk insured for which loss is claimed" (R., 52, 53).

A negotiable bill of lading was issued to the Canadian Cooperative Wheat Producers, Limited, and it sold it to Louis Dreyfus & Company and delivered to that firm, as the buyer, an invoice for 200,000 bushels of Manitoba No. 2 wheat, at a purchase price of $1.38½ per bushel (R., 46, Exhibits "A" and "B"; R., 48, 49).

The certificates of insurance, aggregating $284,000, were turned over with the bill of lading to Louis Dreyfus & Company. Louis Dreyfus & Company had a policy of insurance with the petitioner, Standard Marine Insurance Company, but this policy of insurance contained provisions which precluded the policy from attaching wherever the shipper or Louis Dreyfus & Company had obtained other insurance. See Clause 4 of the Schedule attached to the Standard Marine Insurance Company policy, which reads as follows:

> "To cover all shipments of grain owned by the assured, or in which the assured may have an interest AND NOT INSURED BY THE SHIPPER" (R., 30).

There is no question that the policy of the Scottish Metropolitan Assurance Company, Ltd., the respondent, had attached prior in date to that of the Standard Marine Insurance Company, Ltd., the petitioner, because the Standard Marine Insurance Company's could not attach until the grain had been transferred from the Canadian Cooperative Wheat Producers, Limited, to Dreyfus & Company. This transfer took place after the negotiable bill of lading was issued to the Canadian Cooperative Wheat Producers, Limited, and sold by it to Louis Dreyfus & Co. The cover of the Standard Company was, therefore, limited to the cover contained in Clause 3 of the Schedule appearing on page 30, which is as follows:

"3. To cover 'INCREASED VALUE', on grain owned by the Assured or in which the Assured may have an interest, such 'INCREASED VALUE', for the purposes of this insurance, to be arrived at by taking the difference between the C. I. F. invoice cost and the market value per bushel as set out in the 'New York Journal of Commerce' on the date of sailing of the vessel, plus 5c. (Five Cents) per bushel added thereto: Advices of all such shipments to be mailed to the Company, 64 King Street, East, Toronto, Ontario, Canada, by registered letter on date of sailing of the vessel, or as soon thereafter as practicable."

The "Glenorchy" with the shipment on board sailed from Fort William on October 27th, and on October 29, 1924, was sunk in collision with the steamship "Leonard B. Miller" and became, with her cargo, a total loss (R., 46).

Dreyfus & Company presented a claim on the certificate issued on the cargo policy, and on November 3, 1924, the Scottish Company paid to Dreyfus & Company $284,000, which sum was in fact due from the Scottish Company to Dreyfus & Company in respect of the certificates of insurance mentioned above, "covering the grain which had been insured under open policy No. L-100023 of the Scottish Metropolitan Assurance Co., Ltd., issued to the Canadian Cooperative Wheat Producers, Ltd., which certificates had in due course been endorsed to Louis Dreyfus & Co." (R., 47), this being the full amount at which the grain had been valued in the policy.

On October 30, 1924, the day after the collision, Dreyfus & Company, through their brokers, R. F. Murray & Bro., Inc., made a declaration to the Standard Marine Insurance Company, Ltd., under open policy No. 1010, by letter dated October 30, 1924, supplemented by detailed

statement dated October 31, 1924 (R., 47). In the declaration under the policy, the risk which was submitted to the Standard Company was described as follows:

> "As this steamer sailed on the 27th of October with shipment of grain for Montreal, we are figuring the number of days for this voyage to be ten days, and insured value under our Assured's Open Policy will be figured on the basis of the *highest C. I. F. Montreal quotation* during the ten days from October 27, to which, of course, is added 5c. as provided for in the policy" (R., 63). (Italics ours.)

Exhibit "G" shows the Montreal value as $1.64¾ to which was added the sum of 5 cents, bringing the Montreal value, plus 5 cents, up to $1.69¾ per bushel. That this is the Montreal value is clear from Exhibit "F", from which we have quoted, and the stipulations of facts, which provide that the declaration Exhibit "F" is the declaration under the policy, and that Exhibit "G" is a mere supplement to Exhibit "F". The District Court was therefore quite correct, and followed this statement of facts precisely, when it held that the sum insured by the Standard Company was the sum based on the difference between the C. I. F. price at the port of loading and the C. I. F. price at Montreal, the port of contemplated discharge. In accordance with the debit note, Exhibit "G", and the declaration, Exhibit "F", the Standard Company on November 28th paid to Dreyfus & Company the sum of $62,500, as increased value as figured in Exhibit "G" pursuant to the declaration, Exhibit "F".

In the suit of Dreyfus & Company, as owners of the cargo, against the steamship "Leonard B. Miller", for the loss of the cargo arising out of the collision between the "Leonard B. Miller" and the "Glenorchy", the cargo

owners recovered a total sum of $309,500. This recovery was based upon a stipulation that the actual market value of the cargo on date of shipment was $1.54¾ per bushel, the value at port of shipment, Port Arthur. See affidavit of James T. Irving, Record, 11, 12, at page 12, where Mr. Irving says:

> "2. That on the 27th day of October, A. D., 1924, the official records of the Winnipeg Grain Exchange for wheat for October delivery, basis in store Fort William or Port Arthur were as summarized hereunder:
>
> | | |
> |---|---|
> | Opening price range: | $1.54 at $1.54½ per bushel |
> | High price | $1.54¼ per bushel |
> | Low price | $1.53½ per bushel |
> | Closing price | $1.54¾ per bushel |
>
> 3. That these are prices for wheat basis in store Fort William or Port Arthur."

The recovery, therefore, was $37,500 less than the total sum paid to Dreyfus & Company for cargo loss and by the Standard Company for increased value.

The Standard Company filed a petition in this proceeding, which it later amended, in which it alleged the provision of the policy of the Standard Company relating to the cover of increased value as the portion of the standard contract which related to the fund in controversy (R., 18), and demanded more than $56,000 as its share of the recovery. The Scottish Company answered this petition and alleged that its insurance was a full cover as against the grain and that the insurance issued by the Standard Company was insurance on increased value (pp. 34, 35), and for that reason that the Scottish Company was entitled to full reimbursement in respect of the sum which it had paid, before anything should be paid to the Standard Company. The Court referred this

feature of the case to a Commissioner, who filed a report stating that the Standard Company by the mere fact of payment under its increased value policy, was entitled to share pro rata with the Scottish Company. Exceptions were filed by the Standard Company to this report. The first exception was, as we have previously stated, directed to the obvious error of the Commissioner in assuming that he must find the facts, the facts already having been agreed to by the parties. The other exceptions may be summarized as follows:

1. The Commissioner erred in assuming that the collision recovery (which was the only fund in controversy) represented the price in Montreal at the time the wheat was expected to arrive there. This price or value at destination, Montreal, which was insured by the Standard Company was the excess or increase over the value at time and place of shipment (Fort William), which was insured by the Scottish Company. The collision recovery had been agreed by the parties, and found by the Court, to be the value at the time and place of shipment, this being the exact interest insured by the Scottish Company. No part of the fund in court represented the Montreal price; or any increased value insured against by the Standard Company. There was a small difference between $309,500, the value of the 200,000 bushels at time and place of shipment and the $284,000 paid by the Scottish Company. The Scottish Company of course was not interested in this excess, which would seem to belong properly to the Dreyfus Company itself and not to either of the insurance companies. The Dreyfus Company, however, never filed a claim to it, and as the Standard Company was the only one asserting any right to it, the Court awarded this small excess or difference to the Standard Company. The Court of course reversed the

remainder of the Commissioner's conclusions on the ground that they were based on the mistaken assumption that the value at Montreal instead of at Fort William was recovered in the collision suit.

2. The Commissioner erred in applying the English instead of the American rule with reference to double insurance. Under the American rule, which was incorporated by special provision in both these policies, it was impossible to have double or duplicate insurance. Under the American rule, the Standard Company's policy being subsequently issued, did not attach where any insurance was already effected on the wheat by the Scottish Company.

3. The Commissioner erred in assuming that the case was one of double insurance instead of insurance on distinct risks and interests. The distinction was evident from the fact that the values insured were based on different times and places.

4. The Commissioner erred in concluding that the result was equitable on the mistaken premise that the underwriters could recover back from the assured pro rata $37,000, this being the excess over and above the two sums which were paid by the Standard Company and the Scottish Company to Dreyfus.

5. The Commissioner erred in failing to hold that the Standard Company's policy was on a non-existent and unreal value, because the wheat never arrived at Montreal, the place at which the value was determined. That insurance was on a value which the wheat would have had if it had arrived at Montreal.

The District Court sustained all of these exceptions, and the petitioner on appealing did not even assign as

error the ruling of the trial Court sustaining the exception to the Commissioner's report on the ground that he improperly made the findings of fact which the present petition and brief so largely rely on (R., 87; 1st Exception; R., 92-93, Final Decree Sustaining the Exceptions).

POINT I.

The collision recovery represented the value of the cargo at the time and place of shipment, Fort William (R., 12, 15) which the Scottish Company insured, and not the value at destination, Montreal. The increased value occurring after sailing and during the lake voyage, which the Standard Company insured, would be reflected or realized only in the Montreal price on the date of expected arrival. The Courts below, therefore, were clearly right in holding that the payment by the Standard Company under its policy on increased value based on the "Montreal quotation" (R., 63) was not a payment for any part of the cargo or its value as recovered in the collision suit.

We have in the statement of facts alluded to the fact that the increased value which the Standard Company insured was based on the Montreal price. As we gather from reading our opponent's petition and brief that he contests this fact, we quote the following from the agreed statement of facts:

> "Thereafter Louis Dreyfus & Company, through their brokers, R. F. Murray & Bro., Inc., *made a declaration to the Standard Marine Insurance Company, Ltd., under open policy No. 1010, covering the shipment in question, by letter dated October*

30, 1924, supplemented by detailed statement dated October 31, 1924. No certificate was issued by Standard Marine Insurance Company, Ltd., covering this shipment. True and correct copies of said letter of October 30, 1924, and said statement of October 31, 1924, are hereto annexed, marked Exhibits F and G respectively, and are made a part hereof" (R., 47). (Italics ours.)

We quote Exhibits "F" and "G" in full:

"EXHIBIT 'F'.

R. F. MURRAY & BRO., INC.,
Insurance
N. Y. Produce Exchange Building
No. 8 Broadway

New York City, October 30, 1924.

Toronto Insurance & Vessel Agency,
Toronto, Canada.

Gentlemen:

Re: Louis Dreyfus & Co.,
s/s GLENORCHY—Order No. 170.

Our assured has just received telegraphic advices from their Winnipeg Office, dated October 29th, reading as follows:

'GLENORCHY WHICH LEFT FORT WILLIAM OCTOBER TWENTY SEVENTH SANK THIS AFTERNOON COLLISION WITH L B MILLER.'

As soon as we receive further information in connection with this loss, we will advise you. As this steamer sailed on the 27th of October with shipment of grain for Montreal, we are figuring the number of days for this voyage to be ten days, *and insured value under our Assured's Open Policy will be figured on the basis of the highest C. I. F.,*

Montreal quotation during the ten days from October 27, to which, of course, is added 5c. as provided for in the policy.

As soon as the number of days elapse, we will forward you a statement showing the exact number of bushels shipped, with all other details and in the meantime would appreciate your prompt acknowledgment of this notice. (Italics ours.)

Yours very truly,

R. F. MURRAY & BRO., INC.,
G. E. WOODHOUSE.

GEW:WK."

"EXHIBIT 'G'.

LOUIS DREYFUS & Co.
Produce Exchange Building,

New York, Oct. 31st, 1924.

Debit Note for Messrs. R. F. Murray & Bro., Inc.,
New York, N. Y.
Lake Steamer GLENORCHY (A. 414-415)
Binder No. D 170 No. 2 Nor. Man.

	Highest market value on Oct. 27th $1.64¾ per bushel plus 5c.	$1.69¾
	CIF Invoice value per bushel,	1.38½
	Increased value per bushel	$ .31¼
10/26	Loaded at Ft. William	174,000 bus.
10/26	Loaded at Pt. Arthur,	26,000 bus.
16/26	Total loaded	200,000 bus.
	Lake Steamer GLENORCHY sank on October 29th being a total loss 200,000 bushels at $.31¼ per bushel	$62,500.00"

It is thus evident that the insurance taken out with Dreyfus related to the Montreal value and not the value at Fort William and Port Arthur, the place of shipment. Montreal was the place of delivery; Fort William and Port Arthur the place of shipment. With these facts in mind, the following observations of the District Court are irrefutable:

> "Upon consideration of the questions presented, I am constrained to take an opposite view from that reported by the Commissioner. The insurer is in equity subrogated to such rights only as the assured had. If the owner of the wheat is limited in his right to recover against the offending ship for loss based upon value at the time and place of shipment, it seems clear that subrogation can extend only to such limit of value. Since the owner of the cargo could not recover against the Miller for increased value based upon a market price at the point of delivery, no such right could pass to or be enforced by the Standard Company. * * *
>
> The indemnity provided by the Standard policy does not cover the character of loss for which recovery could be had by the owner against the Miller, and, therefore, the Standard Company is not entitled to prorate with the Scottish Company in the distribution of a fund representing actual value at the time and place of shipping. I think the Scottish Company entitled to full payment from the fund."

The collision fund in court which the assured had recovered, represented only the value of the cargo at the point and place of shipment. The assured had recovered nothing in respect of the value of the grain at Montreal, the port of destination. The Standard Com-

pany insured the market value of the grain at Montreal, less the C. I. F. value at Fort William and Port Arthur. In other words, the subject of the Standard Company's insurance was "increased value", as stated in its policy, representing the difference between the C. I. F. price at port of shipment and the expected value at Montreal, the port of destination. Consequently, it is only the remainder of the fund in court, after deducting the Scottish Company's claim in full, which represents any increase in value. As to that remainder, the controversy is solely between the assured, Dreyfus & Company, and the Standard Company. As was pointed out in the exceptions, the Commissioner was obviously wrong in his conclusions, because his entire reasoning was pyramided on the erroneous assumption that the fund in court represented an actual value of $1.69¾, the market value at Montreal. He apparently disregarded the fact which the parties had stipulated, and the Court had found by its decree in the collision suit, that the fund in court represented only the value at Fort William and Port Arthur, $1.54¾ per bushel on the date of shipment, plus shipping charges. The continued assumption by the Commissioner that the assured had recovered Montreal value, led him into misapplying every principle which he mentioned.

It is elementary that the measures of damages of the cargo owner in a collision suit against a non-carrying vessel, is the value at point and time of shipment, plus freight, insurance premium and other shipping charges.

In *The Oceanica*, 156 Fed. 306, 307, the Court said:

> *"That the proper rule of damages, where cargo is lost in transit on account of collision, is its value at the place of shipment, together with the carrying expenses incurred, is settled by the authorities. The Umbria*, 59 Fed. 489, 8 C. C. A.

194; *The Vaughan & Telegraph*, 14 Wall. 258, 20 L. Ed. 807; *The Scotland*, 105 U. S. 24, 26 L. Ed. 1001."

In *The Scotland*, 105 U. S. 24, 35, the "Kate Dyer", bound from Callao, Peru, for New York, with a cargo of guano, was in collision off Fire Island Light. This Court said (105 U. S., at pp. 35-36):

> "The question raised as to the rule of damages which should be adopted, in estimating the actual loss of the owners of the guano, was properly decided by the Circuit Court. *The rule is, the prime cost or market value of the cargo at the place of shipment, with all charges of lading and transportation, including insurance and interest, but without allowance for anticipated profits.*"

In *The Umbria*, 59 Fed. 489, 490, a collision case, the United States Circuit Court of Appeals for the Second Circuit said:

> "In some of the cases the cargo was a total loss, none of it having been recovered from the sunken vessel. In such cases, the correct rule of damages is to allow the value of the cargo *at its place of shipment*, or its costs, including expenses and charges and insurance and interest. See *The Aleppo*, 7 Ben. 120. The Commissioner correctly included among the expenses all the items which he allowed."

In *Smith* v. *Condry*, 1 How. (42 U. S.) 28, 35, this Court said:

> "It has been repeatedly decided in cases of insurance, that the insured cannot recover for the loss of probable profits at the port of destination, and that the value of the goods at the place of shipment is the measure of compensation. There

can be no good reason for establishing a different rule in cases of loss by collision. It is the actual damage sustained by the party at the time and place of the injury that is the measure of damages."

In *The Vaughan and Telegraph*, 14 Wall. (81 U. S.) 258, 267, this Court said:

> "In the District Court it was held that the proper rule of damages where a cargo is lost *in transitu* by a collision, or other tort, is *the value of the goods at the time and place of shipment.* It was conceded that upon the breach of a contract for the delivery of goods at a particular place the measure of damages is the full value of the goods at such place. Both propositions are correct and are well-settled in our jurisprudence."

In *The Aleppo*, 1 Fed. Cases No. 158 (S. D. N. Y.) a case of collision, the Court after exhaustively reviewing the authorities, said (at pp. 343 and 344):

> "The exceptions raise the question, whether the allowance for loss of cargo ought to be the market value of it in Boston at the time of the loss, less freight, duties, and charges for lading; or, whether it should be only the actual cost of the cargo when on board of the vessel at the port of shipment (including expense of lading), which may be regarded as its market value when on board, at such port, *without any addition for any increase in the market value* of like cargo at such port, occurring prior to the time of the loss; or whether it should be what the report allows, namely, the actual cost when on board of the vessel, at the port of shipment (including expense of lading), with the addition of the increase in the market value of like cargo at such port occurring

prior to the time of the loss. * * *. All these considerations lead to the conclusion that profits, on the supposition of the prosperous termination of the voyage, ought not, in any case, to constitute an item of damage."

And again in *The Aleppo*, 1 Fed. Cases No. 158, at pages 345 to 347, it is said:

"The libellants, in supporting their exception, contend that the proper measure of damages is the market value of the wool in Boston, on the day of its loss, less duties, freight and charges for landing, and less also (an item not referred to in their exception, or before the commissioner) the reasonable cost of insuring the cargo from the place of loss to Boston. They insist that this would give the value of the cargo at the time and place of its destination, and would be in accordance with the rule laid down in *Smith* v. *Condry* [1 How. (42 U. S.) 28]. But this construction of the rule would fritter it away altogether. * * *

It is contended by the libellants, that *Smith* v. *Condry* (*supra*), is overruled by *Williamson* v. *Barrett* (*supra*), if the former case is to be considered as laying down the rule, that *increased values* or expected profits or earnings can never be allowed as damages in collision cases. It is sufficient to say, that the supreme court, and the judges who concurred in the opinion of the court in the latter case, have never regarded the latter case as overruling the former. Mr. Justice Nelson, who delivered the opinion of the court in the latter case, cites the former case, in *The Ocean Queen* (*supra*), as settling the rule which is to govern on like questions in all cases of marine torts. In the case of *The Vaughan* and *The Telegraph* (*supra*), the supreme court sanction the

rule which in the same case, I had, on the authority of *Smith* v. *Condry* (*supra*), *adopted;* and in the very next case in the same volume (*The Cayuga,* 14 Wall. (81 U. S.) 270), the same court maintains the doctrine of *Williamson* v. *Barrett* (*supra*), that reasonable demurrage, for unavoidable detention while repairing an injured vessel, is a proper charge in all suits for damages by collision. * * *

It is equally impossible to sustain the rule of damages adopted by the commissioner. The general *increase in market* value, between the time of shipment and the time of the collision, was claimed and disallowed by the circuit court for this district, in the case of *The Ocean Queen* (*supra*). I should feel bound by that decision, so long as it was not overruled, even if I did not concur in its propriety. But it seems to me a correct decision. No principle of *restitutio in integrum,* or of putting the suffering party as nearly as possible in the same situation in which he would have been if no collision had taken place, or of giving him the actual damage sustained by him at the time and place of the injury, or of giving him indemnity to the extent of the loss sustained—as the general rule is thus variously expressed—requires or admits an allowance made on the principle adopted by the commissioner in this case. * * * It had, however, no further value to them, at that place, and their actual loss was nothing more than such money, with interest. Restoring to them that money, with interest, restores all they actually lost. *All beyond that was expected profits.* The wool was not in Montevideo, so as to have applied to it *any increase in market value, after it left there,* which might have applied to it if it had remained there

and been sold. *The increase in value after it left there, and while it was on the voyage based on an increase in the value there of like wool is as much contingent as an increase in its value* based on a price of like wool in Boston, at the time of the loss, higher than the price paid in Montevideo. The value of the wool to these libellants at the time and place of the loss, was only what it cost them to buy it and convey it to the place of loss, with interest. So, too, they cannot be allowed for any increase in market value at Montevideo or other place of purchase or shipment, between the time of purchase and the time of shipment. The rule is one which must operate uniformly in all cases."

See also *The Old Reliable,* 262 Fed. 108, 110 (C. C. A., 4), where the Court said:

"The value of the ties at place of destination was charged to respondent, 93 cents for No. 1 and 83 cents for No. 2. The profit, which we understand to mean the difference between the original cost, together with freight and insurance, other costs of transportation, and the selling price, was to be 15 cents on each tie. *In Admiralty* the measure of recovery for goods lost is the price at the place of purchase, together with freight, insurance, and other charges of transportation *without profit.* The profit, 15 cents each, should be deducted, and the ties charged at 78 cents for No. 1 and 68 cents for No. 2."

In *Guibert* v. *British Ship George Bell,* 3 Fed. 581, 584-585, the Court said:

"No matter how near the vessel may have reached to her port of destination, the market price at the port of destination is not allowed to

enter into the estimate of the value, and all profits or *probable benefits* which would have resulted from the termination of a voyage almost completed, *are rigorously excluded. The Amiable Nancy,* 3 Wheat. 546; *The Lively,* 1 Gull. 314 (315); *Smith* v. *Condry,* 1 How. 28; *The Vaughan* and *The Telegraph,* 14 Wall. 258, 267; *The Aleppo,* 7 Ben. 120, 124."

We have quoted at length from these authorities, so that it will be quite clear that in a collision case an increased value such as the Standard Company insured, is excluded from the recovery. We have italicized passages in the various opinions where the Courts deliberately point out that the reason the value at port of shipment should be taken is that the value at destination included "increased value". The assured, therefore, had no cause of action upon a market value at destination, Montreal. Hence as such "increased value" is what the Standard Company insured there was nothing to which the Standard Company could be subrogated in respect of such "increased value". The Courts below were, therefore, quite correct, when they held that as the assured had no cause of action, in respect of increased value, there was nothing to which the Standard Company could be subrogated in respect of such increased value. For, as said by those Courts, the assured could only subrogate the insurer in respect of rights which the assured had. This is the well established equity rule.

In *Phoenix Insurance Company* v. *Erie and Western Transportation Company,* 117 U. S. 312, at page 320, this Court said:

"When goods insured are totally lost, actually or constructively, by perils insured against, the insurer, upon payment of the loss, doubtless

becomes subrogated to all the assured's rights of action against third persons who have caused or are responsible for the loss. No express stipulation in the policy of insurance, or abandonment by the assured, is necessary to perfect the title of the insurer. From the very nature of the contract of insurance as a contract of indemnity, the insurer, when he has paid to the assured the amount of the indemnity agreed on between them, is entitled, by way of salvage, to the benefit of anything that may be received, either from the remnants of the goods, or from damages paid by third persons for the same loss. But the insurer stands in no relation of contract or of privity with such persons. *His title arises out of the contract of insurance, and is derived from the assured alone, and can only be enforced in the right of the latter.*" (Italics ours.)

The subject matter of the insurance here effected by the Standard Company was the "increased value". It was so specified in the Standard Company's policy. The policy provided that it was to recover "increased value" on grain, and that such increased value was to be arrived at by taking the difference between the C. I. F. invoice cost and the highest market value per bushel, plus 2 cents, as set out in The New York Journal of Commerce, at the port of final delivery. The assured, in making their declaration, which was accepted by the Standard Company, stated the Montreal price as the market value contemplated in the contract. This declaration was accepted and the loss was subsequently adjusted on the declaration so made. The subject matter of the insurance, therefore, of the Standard Company, was the profit between the C. I. F. price at Port Arthur and the price at Montreal, the port of final delivery.

Such a subject matter of the insurance was identical with that described in *Canada Sugar Refining Co.* v. *Insurance Co.*, 175 U. S. 609, at page 625, where such an interest was under discussion by this Court. This Court quoted with approval the following language from Phillips on Insurance:

> "The profit, then, which is the subject of a policy upon this interest is the excess of the value of the subject at the port of destination over its value at the shipping port."

And in *Thames & Mersey Marine Insurance Co.* v. *British & Chilean S. S. Co.*, 13 Asp. Mar. Cas. 221; (1916) 1 K. B. 30, Scrutton, *J.*, now one of the Lord Justices of the Court of Appeal and one of the most eminent English authorities on the law of insurance, held that an underwriter was only entitled to subrogation TO THE EXTENT TO WHICH IT HAS PAID IN RESPECT OF THE SUBJECT MATTER INSURED.

The declaration (Exhibit F at p. 63 of the Record) and the debit note (Exhibit G at p. 64 of the Record), on which the appellant computed and paid the loss under its policy show that what it insured was the value on October 27th not of this cargo of wheat which was on that date at Fort William, but of a similar quantity of wheat on that date at Montreal.

> "Insured value under our assured's open policy will be figured on the basis of the highest c. i. f. Montreal quotation during the ten days from October 27th, to which, of course, is added five cents, as provided for in the policy" (R., 63).
>
> "Highest market value on October 27, $1.64¾ per bushel, plus five cents—$1.69¾" (R., 64).

The undisputed evidence shows that on that same date, October 27th, the value of this cargo on the "Glenorchy", which was then at Fort William, was only $1.54¼ per bushel, and that is all that was recovered in the collision suit (R., 12). The difference between the value—$1.54¾ per bushel—of this cargo on the "Glenorchy" as it existed at Fort William on October 27th, and the value of a hypothetical similar quantity of wheat at Montreal on the same date—$1.64¾—is ten cents per bushel. This difference was not recovered in the collision suit and is the difference or increase in value which the appellant insured. The suggestion of counsel for appellant that this cargo, as it actually existed at Fort William, had, in addition to its value at Fort William, a value at a far distant point, namely, Montreal, shocks common sense. It is obvious that the increased value which the appellant insured was the anticipated profit which appellant's assured expected to derive if the cargo actually arrived at Montreal. But it is just this element of anticipated profit which is not recoverable in a collision suit and which was not recovered here. It is an elementary principle of marine insurance law that an insurance on profits is not an insurance on the cargo, or on the property itself and, therefore, does not entitle the underwriter to subrogation if any loss is paid. Indeed, this Court held long ago that a cargo owner could establish a total loss under a policy on profits by merely showing that the cargo did not in fact arrive at destination without showing that the cargo or any part of it was lost. *Patapsco Ins. Co.* v. *Coulter*, 3 Peters (U. S.) 222.

POINT II.

The Standard's policy was in fact insurance on increased value or profit, and was not insurance on the cargo.

In *Strass* v. *Spillers*, Law Reports (1911), 2 King's Bench Division 759, the Court held that a policy taken out by the shipper on "increased value" of a cargo of wheat was not a policy on the cargo itself and therefore that the shipper need not deliver that policy to the buyer under a C. I. F. contract with the cargo policies and was himself entitled to retain permanently any money collected under the increased value policy in case the cargo should not reach destination, notwithstanding the loss occurred after the shipper had sold the goods to the buyer. This decision is squarely in point to the effect that a policy on increased value of cargo is not a policy on the cargo itself. The syllabus in that case reads as follows (1911, 2 King's Bench Division at p. 759):

> "The defendants bought a cargo of wheat at a price to cover cost, freight and insurance under a contract which contained the clause 'Seller to give policies of insurance (free of war risk) for 2 per cent. over the invoice amount, and any amount over this to be for seller's account in case of total loss only'. In order to fulfil the contract the seller bought a cargo of wheat from a person to whom the plaintiff had sold it, the contracts throughout being in the same form and containing the above clause. The plaintiff handed over to the buyer from him a policy for 2 per cent. over the invoice amount, and this policy was handed over to the defendants in due course.

The plaintiff, before selling the cargo, had taken out an honour policy on increased value of the wheat for his own benefit, which policy he retained in his own possession. A loss having occurred, the underwriters paid the defendants the full amount under the policy which had been handed over to them. The plaintiff then sent the increased value policy to the defendants, requesting them to collect from the underwriters the amount payable thereunder. The defendants did so, and upon being paid the amount by the underwriters they claimed to retain it upon the ground that under the contract of sale the plaintiff was bound to hand over all policies effected on the wheat at the time when he entered into the contract of sale. In an action by the plaintiff to recover the amount as money had and received to his use:

Held, that, as the increased value policy was an independent honour policy effected by the plaintiff for his own benefit, the defendants were not entitled to it under the contract, and that the plaintiff was entitled to recover the amount received by the defendants thereunder as money had and received to his use."

The Court in that case held that if the policy on increased value of cargo had been tendered to the buyer as one of the policies under the C. I. F. contract it could properly have been rejected by the buyer on the ground that *IT WAS NOT EXPRESSED TO BE UPON CARGO, BUT UPON INCREASED VALUE OF CARGO* (at p. 768 of (1911) 2 K. B. D.). Referring to the increased value policy, the Court held that:

"It is to be observed that the policy is expressed to be *ON INCREASED VALUE;* to pay as cargo, showing that *IT IS NOT IN THE ORDINARY SENSE A MERE INSURANCE ON CARGO.*

> * * * It was a legitimate speculation, carried out by means of honour policies, in view of the rise in the market value of wheat, which might lead the plaintiff to desire to have further business protection than the other policies would give him. An experienced broker at Lloyd's was called, whose evidence was not in any way challenged, and he stated that this form of insurance is common, *NOT AS A MODE OF INSURING CARGOES, BUT, AS I UNDERSTOOD HIM, AS ANCILLARY TO THE TRADE IN GRAIN*" (pp. 768 and 769 of 1911, 2 K. B. D.).

And referring to the contention of the buyer in that case (the appellant in the present case), the Court said at page 774 of 1911, 2 K. B. D.:

> "They must have appreciated from the terms of the policies that this was not the kind of policy which is tendered for payment by an ultimate receiver of the goods, but is such a policy as is tendered by persons who wish independently to insure the goods to protect themselves against the fluctuations of the market."

Mr. Justice Hamilton, delivering judgment in the *Strass* case, said (1911, 2 K. B. D. at p. 768):

> "It is to be observed that the policy is expressed to be *ON INCREASED VALUE;* to pay as cargo, showing that *IT IS NOT IN THE ORDINARY SENSE A MERE INSURANCE ON CARGO* * * *."

The Commissioner discusses at length *The Livingstone*, 130 Fed. 746. He says:

> "So in the case at bar, if Dreyfus and Company could not profit by their loss, neither should the

Standard Marine Insurance Company or the Scottish Metropolitan Assurance Company" (R., 75).

It is obvious that neither the Scottish Company nor the Standard Company profited or can profit by this loss or recovery and this reasoning of the Commissioner is due to his misunderstanding of the question which was before him for determination. *Dreyfus & Company could and did profit by their loss.* They recovered from the Standard Company $37,000 more than the actual value of the grain and this profit rightfully belonged to them. The only conclusion that can be drawn from this fact is that Dreyfus insured this "increased value" or profit with the Standard Company.

In *Canada Sugar Refining Company* v. *Insurance Company of North America*, 175 U. S., at page 625, this Court said:

> "The profit, then, which is the subject of a policy upon this interest *is the excess of the value of the subject at the port of destination over its value at the shipping port.*"

Similarly in the present case, the "increased value" insured by the Standard Company was in legal effect "profits" because it did not represent an actual value and/or expenditure or investment made. The increase in value should not occur until the wheat should arrive at Montreal and thus earn or bring into existence the "value". The only conclusion to be derived from this state of facts is that reached by the Courts below, viz.: that as there had been no recovery in respect of such increased value there was nothing to which the Standard Company could be subrogated in respect of such increase.

POINT III.

There was no double insurance because the American rule was incorporated by special provision in both the policy issued by the Standard Company and that issued by the Scottish Company. Under the American rule, the Standard policy being subsequent in time, did not attach as to any insurance effected on the grain by the Scottish Company.

We have pointed out in the previous portion of this brief, that the Scottish Company's insurance was effected before the grain became the property of Dreyfus and while it was still the property of the Canadian Co-operative Wheat Producers, Ltd., and that the Standard's policy did not attach until the grain became the property of the Dreyfus Company. Hence, it is obvious that the insurance of the Scottish Company was prior in date to that of the Standard Company. The Standard Company's policy provides:

> "Provided always, and it is hereby further agreed, that if the said insured shall have made any other insurance upon the property aforesaid, prior in date to this policy, then this Company shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the property hereby insured; and this Company shall return the premium upon so much of the sum by them insured as they shall be by such prior insurance exonerated from. And in case of any insurance upon the said property, subsequent in date to this Policy, this Company shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, with-

out the right to claim contribution from such subsequent insurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no subsequent insurance had been made."

The Scottish Company's policy provides:

"PROVIDED ALWAYS, and it is hereby further agreed, that if the said Insured shall have made any other insurance upon the goods aforesaid, prior in day of date to this Policy, then the said Assurers shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully recovering the goods hereby insured; and the said Assurers shall return the premium upon so much of the sum by them insured, as they shall be by such prior insurance exonerated from. And in case of any insurance upon the said goods subsequent in date to this Policy, the said Assurers shall nevertheless be answerable for the full extent of the sum by them insured, without right to claim contribution from such subsequent insurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent insurance had been made. Other insurance upon the goods aforesaid, of date the same day as this Policy, shall be deemed simultaneous herewith; and the said Assurers shall not be liable for more than a ratable contribution in the proportion of the sum by them insured to the aggregate of such simultaneous insurance."

In Winter on Marine Insurance, New York, 1919, page 164, it is said:

"The American theory of double insurance as herein set forth is that if insurance has been effected prior in day of date to the policy in ques-

tion the underwriter shall be relieved of all liability for loss except in so far as the prior policy is deficient in amount, not fully protecting the property insured. The insurance company agrees to return premium on so much of the amount as is over insurance.

If there are two or more policies on the same property and aggregating in amount more than the insured value of it, simultaneous in day of date, then the various underwriters become co-insurers, each agreeing to be responsible for his *pro rata* proportion of the loss and each retaining his *pro rata* share of the premium. If the policy in question, however, is prior in date to any other policy then the underwriter agrees to assume full responsibility for loss to the amount of his policy, and is entitled to retain the full premium charged."

The parties, therefore, by their own agreements, have clearly provided that the subject-matter of the two insurances was not the same. One is insurance on cargo and the other is insurance on increased profits.

POINT IV.

The decisions below do not conflict with the decision in the Ninth Circuit in *Brown* v. *Merchants Co.*, 152 Fed. 411.

The facts in *Brown* v. *Merchants Marine Insurance Company*, 152 Fed. 411, discussed at length by petitioner, are wholly different from those in the present case. It deals entirely with hull insurance and not cargo insurance, and with a situation where the value of the insured property was *in excess* of the aggregate of all of the insurance there involved. In the case at bar the value

of the insured property was *less* than the aggregate of insurance on cargo plus insurance on increased value. In the recent case of *Gulf Refining Co. v. Ins. Co.*, 279 U. S. 708, where this Court was considering cargo insurance, the American cases dealing with hull insurance were cited to induce the Court to reach a conclusion which was not in accord with the decisions of the English courts. At page 715 of the opinion this Court took occasion to say:

> "The other American cases have dealt with insurance on hulls and so are not decisive."

In the *Brown* case the actual value of the property involved was $140,000. Owing to the fact that the amount recovered was reduced to $47,426.97 because both vessels were to blame, there was a dispute as to how this sum was to be divided. There was insurance on hull and other insurance on disbursements. As appears from the tabulation on page 10 of the petitioner's brief, the owner of the "City of Kingston" was co-insurer to the extent of $48,000, but it appears from the report of the case, 152 Fed. at page 412, that the owner received nothing in respect of its interest as a co-insurer, for the Court says (page cited):

> "In February, 1904, the District Court ordered the payment to the said insurance companies, other than the appellees herein, of all the funds then in the court, save in the sum of $4,132.92, and subsequently, under the order of the court, that sum was paid to the appellees herein."

If counsel for petitioner's reasoning in connection with the *Brown* case were correct, the owner of the "City of Kingston" would obviously have received a part of the recovery. But it is clear from the reports that the owner did not receive any part of it. And the precise opposite of the petitioner's contention in this respect has again

been decided as the settled rule in the recent English case of *Goole* v. *Ocean Marine Ins. Co.*, L. R. (1928) 1 K. B. D. 589, 29 Lloyds List Law Reports 242, at pages 245 and 246. Therefore the novel rule suggested by counsel for petitioner should not be adopted, for the reason announced in *Gulf Refining Co.* v. *Atlantic Mutual Marine Insurance Company*, 279 U. S. 708, and in *Queens Insurance Company* v. *Globe & Rutgers Fire Insurance Company*, 263 U. S. 487, 493, where this Court said:

> "There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business."

Especially is this true when all of the parties are, as in the present litigation, British subjects and the contracts were made in a British dominion and the carriage of the grain was from one British port to another British port.

The inapplicability of the decision in the *Brown* case seems obvious from the fact that the actual value in that case was in excess of the insured value, whereas here the actual value was less than the insured value. In the *Brown* case the actual value was $140,000 and the insurance was far less than that sum. This appears from page 10 of petitioner's own brief. Here the actual value was $308,000 and the insured value was in excess of that sum, and the whole dispute in this case arises from the fact that the insured values were in excess of the actual value.

CONCLUSION.

The petition for a writ of certiorari should be denied.

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